

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PARCEL SERVICE, INC.

and

Case 06-CA-143062

ROBERT C. ATKINSON, JR.

NOTICE AND INVITATION TO FILE BRIEFS

On November 25, 2016, Administrative Law Judge Geoffrey Carter issued a decision in the above-captioned case, finding, *inter alia*, that it was inappropriate for the Board to defer to a joint grievance panel that upheld the discharge of the Charging Party. Specifically, he found that under the postarbitral deferral standard announced in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), the Respondent did not carry its burden to demonstrate that the grievance panel considered the statutory issue of whether the Respondent violated the National Labor Relations Act by discharging the Charging Party.¹

In *Babcock*, the Board announced a new standard for deferring to arbitral decisions in cases alleging violations of Section 8(a)(3) and (1) of the Act. Under this standard, if the arbitration procedures appear to have been fair and regular, and if the

¹ The standard for deferral to a joint grievance panel is identical to that generally applicable to arbitration awards. *Airborne Freight Co.*, 343 NLRB 580, 580 (2004).

parties agreed to be bound,² the Board will defer to an arbitral decision if the party urging deferral shows that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. *Id.* at 1131.

Babcock replaced the previous standard, under which the Board deferred to an arbitration award when (1) the arbitration proceedings were fair and regular; (2) all parties agreed to be bound; and (3) the arbitral decision was not repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Further, the arbitral forum must have considered the unfair labor practice issue. The Board deemed the unfair labor practice issue to have been adequately considered if (1) the contractual issue was factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. *Olin Corp.*, 268 NLRB 573 (1984). The burden of proof rested with the party opposing deferral.

The parties are invited to address the following questions:

1. Should the Board adhere to, modify, or abandon its existing standard for postarbitral deferral under *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014)?
2. If the Board decides to abandon the *Babcock* standard, should the Board return to the holdings of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), or would some other modification of the Board's standard for postarbitral deferral be more appropriate?
3. If the Board decides to abandon the *Babcock* standard in favor of either the *Spielberg* / *Olin* standard or some other standard for postarbitral deferral, should

² These traditional requirements for deferral were unchanged by *Babcock*. *Id.* at 1131 fn. 10.

it apply the newly adopted standard retroactively in this case and other pending cases or prospectively only?

Supplemental briefs not exceeding 25 pages in length may be filed with the Board in Washington, D.C. on or before **April 29, 2019**. The parties may file responsive briefs on or before **May 14, 2019**, which shall not exceed 15 pages in length. The parties shall file briefs electronically at <http://mynlrb.nlr.gov/efile> and serve all case participants. If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C., March 15, 2019.

By direction of the Board:

/s/ Roxanne Rothschild
Executive Secretary

MEMBER McFERRAN, dissenting.

Unlike my colleagues, I would decide this case under the postarbitral deferral standard announced in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014). First, no party to this case has asked the Board to overrule, modify, or even revisit *Babcock*. To the contrary, the Respondent affirmatively cited *Babcock* as “controlling precedent” and is simply arguing to the Board that the judge reached the wrong result under *Babcock*.

Second, revisiting *Babcock* at this time is premature because the Board's adjudicative experience with *Babcock* is extremely limited. The decision issued less than 5 years ago and applied only prospectively. Moreover, as a practical matter the *Babcock* Board further extended the effective date of the decision for many employers

and unions. Recognizing that many then-current collective-bargaining agreements would not satisfy the first requirement of the revised deferral standard – that the arbitrator be explicitly authorized to decide unfair labor practice issues –the Board provided that, in such circumstances, the revised *Babcock* standards would not apply until those agreements had expired, or the parties had agreed to submit particular statutory issues to arbitration. As a result, there appears to be only *one* published Board decision applying *Babcock* since its issuance. See *Mercy Hospital*, 366 NLRB No. 165 (2018). The Board surely would benefit from gaining more experience with *Babcock* before attempting to evaluate suggestions to adhere, modify, or abandon it.

To be sure, the majority's decision in this instance to seek briefing from the parties is welcome. Better yet, though, the majority ought to adhere to the Board's sound, traditional practice of seeking participation from the *public at large* before reconsidering a significant precedent such as this one. Nevertheless, I will fully consider with an open mind whatever evidence and input might result from the majority's request for briefing by the parties. I trust that my colleagues will, in turn, also remain equally open to adhering to current law.

Lauren McFerran, Member